



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 85 OF 2014

PAUL NDUNG'U MUCHEKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of B. Ochieng, Acting Chief Magistrate, in Criminal Case No. 7 of 2012 at Murang'a dated 8th May 2014]

JUDGMENT

1. The appellant was adjudged guilty of attempted defilement of a child contrary to section 9 (1) (2) of the **Sexual Offences Act**. He was sentenced to *10 years* imprisonment.
2. The offence was committed on 3rd October 2011 at *M. village [particulars withheld]*, Murang'a County. The particulars were that he attempted to penetrate the vagina of *BW [particulars withheld]*, a child aged 15 years.
3. The appeal is contested by the Republic. The case for the State is that the appellant received the *minimum* sentence. I was implored to dismiss the appeal.
4. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. This appeal only relates to the *sentence*. The original petition was filed on 29th May 2014. It challenged both his *conviction* and sentence. However, on 26th June 2019, the appellant unequivocally *abandoned* the appeal on *conviction*.
6. The evidence of PW1's father established that the victim was a child with special needs having suffered an illness back in class 2. She had difficulties with speech but she could write. So when she complained to PW3 she *wrote* down the *name* of the appellant as the person who attempted to defile her. The appellant lived in the same village with the victim. That evidence was corroborated by PW1 and PW2.
7. I drew a further *inference* of guilt because the appellant went *underground* for about *five months*. His defence in the lower court was *bogus*. I thus find that the conviction was *safe*.
8. The appellant pleaded for *leniency*. He said he is *remorseful* for his actions. He said he has been in jail since 2014; and, that he has reformed. In a synopsis, the entire appeal is a plea for *mercy*.
9. Section 354 (3) of **Criminal Procedure Code** empowers this court to *review* the sentence. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal held-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors.”

10. The learned trial magistrate considered that the appellant was a *first offender*. The appellant in mitigation said: “*I plead for leniency; I have been in remand for the past 3 years*”. I cannot say the learned trial magistrate applied wrong principles or overlooked some material factors.
11. Despite the fresh clamour for leniency, this was a serious felony. Section 9 (2) of the Act provides for a *minimum* sentence of *ten years*.

That is the sentence that was handed down to the appellant.

12. The appeal is dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 11th day of July 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Ms. Ruth Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.